ERNEST CHEONG YONG YIN A

v.

LOW KIM YAP & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
ROHANA YUSUF JC
[CIVIL SUIT NO: S4-22-263-2004]
20 APRIL 2006

TORT: *Defamation - Lodging of complaints - Complaints made against plaintiff to Board of Valuers - Qualified privilege - Defence of - Whether defendants have legal rights to make complaints - Whether Board has legal duty to receive complaints - Whether defence of qualified privilege available* C

TORT: *Defamation - Obligation to give particulars - Rules of the High Court 1980, O. 78 r. 3 - Statement of claim - Failure to particularize facts and matters - Whether plaintiff has the original alleged defamatory statement made by defendants - Whether claim based on hearsay and speculative in nature - Whether plaintiff's claim struck off* D E

CIVIL PROCEDURE: *Striking out - Rules of the High Court 1980, O. 18 r. 19 - Application to strike out plaintiff's claim - Issues raised - Whether plain and obvious case for plaintiff's claim to be struck off*

This was a notice of appeal by the defendants 2, 4, 5, 7, 9, 10, 11, 12, 15, 17 and 18 (collectively 'the defendants') in encl. 57 against the decision of the senior assistant registrar dismissing the application of the defendants to strike out the claim of the plaintiff under O. 18 r. 19 of the Rules of the High Court 1980. As owners and co-owners of certain lands, the defendants were notified by Federal Government that part of their lands was to be acquired for the purpose of upgrading Jalan Kelang Lama, Kuala Lumpur. All the defendants in this suit appointed CIMBL PTL (M) Sdn Bhd (CIMBL) to be their consultant to assist them to seek compensation from the government of Malaysia in connection with the acquisition. The plaintiff was a registered valuer under the Valuers, Appraisers and Estate Agents Act 1981 ('the Act') and was appointed by CIMBL, of which he was a director, to provide valuation services and to assist CIMBL PTL to prepare individual valuation reports for each of the defendants. Some unhappiness occurred over the compensation issue which led to complaints being made by the defendants to the Board of Valuers ('the F G H I

Board') against the plaintiff. The plaintiff, after having obtained information from the Board on the numerous complaints lodged by the defendants, was now suing the defendants in a defamation action under the name and style of Ernest Cheong PTL Chartered Surveyors VE (3) 0017 as a practicing valuer. The main contention of the defendants in the striking out application was that the complaints made were on an occasion of qualified privilege. The second issue brought up by the defendants was that the statement of claim did not particularize the facts and matters relied upon by the plaintiff as required by O. 78 r. 3 Rules of the High Court 1980 because the plaintiff's cause of action was based on the reply letter from the Board which was merely a letter informing the plaintiff of the complaint received and requiring the plaintiff to appear before the Enquiry Committee. The plaintiff, however, put up the arguments that the defendants had no right of complaint against the plaintiff as valuer as the defendants had appointed CIMBL PTL and not the plaintiff directly and that the plaintiff should be distinguished from CIMBL PTL. Further, the plaintiff contended that whilst it was true that the statement of claim did not particularize the facts as required, the facts were within the full knowledge of the defendants.

Held (allowing defendants' appeal):

(1) The plaintiff's status as a registered valuer was subject to the respective laws regulating the registration. The plaintiff was appointed by a company of which he himself was a director. The defendants were complaining against the plaintiff, amongst other things, for charging fees of 30% of their compensation award which they felt was excessive. They were directly affected by the act of the plaintiff, a registered valuer who clothed himself in the guise of a company to protect himself from the laws that govern his professional conduct. (para 5)

(2) The Valuers, Appraisers and Estate Agents Rules 1986 ('the Rules') is a subsidiary legislation made under s. 32 of the Act. Under r. 133A of the rules, a complaint must be made in writing. The defendants' complaints against the plaintiff were properly lodged with the board in accordance with the required procedure under the rule. The defendants were exercising their rights given by the law to complain against a registered valuer. The complaints were done in accordance with a written law that provides for a proper avenue of

complaint. An express duty of the board as set out in the Act was to maintain discipline and good governance amongst registered valuers who hold themselves out as professionals in the practice of valuation. (paras 6, 7 & 9)

(3) On the point of reciprocity required on the part of the receiver of the complaints, the board was not only a body with a corresponding interest but was also under a legal obligation as mandated by the law. The defendants showed that they have legal rights to complain and the board, quite clearly had a legal duty to receive the complaints. This court was in full agreement with the submission that the defence of qualified privilege was available to the defendants. (para 15)

(4) The plaintiff did not have the original alleged defamatory statement made by the defendants. The letter issued by the board could not form the basis of the plaintiff's claim against the defendants. A claim for defamation must be based on an original publication or statement and the alleged defamatory statement must be particularized in accordance with O. 78 r. 3 Rules of the High Court 1980. Both these requirements were absent herein. The claim was based on hearsay and therefore speculative in nature. (paras 18 & 19)

(5) As the defendants have complied with the procedure for making complaints, no malice could be inferred. Allowing a defamation suit of this nature to continue defeats the whole purpose of the complaint process set up by law and must not be encouraged. If claims of this nature were allowed, the floodgates would be opened to defamation suits whenever disciplinary bodies receive complaints from the public against their members. The public should be free to lodge complaints as a means of recourse against what they perceive to be wrong or unprofessional conduct as long as they do so within the confines of the law. They should be allowed to do so without having to fear the possibility of legal action. This was a plain and obvious case for the plaintiff's claim to be struck off. (para 21)

Case(s) referred to:
Adam v. Ward [1917] 2 AC 15 ***(refd)***
John Lee & Anor v. Henry Wong Jan Fook [1981] 1 MLJ 108 ***(refd)***
Karthak v. Damai [1962] MLJ 423 ***(refd)***
Worker's Party v. Tay Boon Too & Anor [1975] 2 MLJ 124 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19, O. 78 r. 3
Valuers, Appraisers and Estate Agents Act 1981, ss. 10, 32
Valuers, Appraisers and Estate Agents Rules 1986, rr. 133A, 134A

For the plaintiff - Frederick S Walter; M/s Vela, Walter & Assoc
For the defendants no. 2, 4, 5, 7, 9, 10, 11, 12, 15, 17 & 18 - SL Wong (Anne Wong with him); M/s SL Wong & Lim

Reported by Suhainah Wahiduddin

JUDGMENT

Rohana Yusuf JC:

This is a notice of appeal by the defendants numbered 2, 4, 5, 7, 9, 10, 11, 12, 15, 17 and 18 (collectively, "the defendant") in encl. 57 against the decision of the learned senior assistant registrar dismissing the application of the defendants to strike out the claim of the plaintiff under O. 18 r. 19 of the Rules of the High Court 1980. I have allowed the appeal of the defendants, and my reasons are set out below.

Background Facts

[1] As owners and co-owners of certain lands, the defendants were notified by Federal Government Gazette Notification No 882 dated 1 February 2001 that part of their lands was to be acquired for the purpose of upgrading Jalan Kelang Lama, Kuala Lumpur. All the 22 defendants in this suit appointed CIMBL PTL (M) Sdn. Bhd. ("CIMBL") to be their Consultant to assist them to seek compensation from the Government of Malaysia in connection with the acquisition. Amongst the terms of the appointment were that:

(a) the fees to be paid to CIMBL would be 30% of the compensation finally awarded;

(b) valuation fees would be paid by the defendants to a valuer to be appointed by CIMBL; and

(c) CIMBL would have the exclusive rights to take all necessary steps towards obtaining the compensation. A

[2] The plaintiff is a registered valuer under the Valuers, Appraisers and Estate Agents Act 1981 ("the Act"). He was appointed by CIMBL, of which he is a Director, to provide valuation services and to assist CIMBL PTL in preparing individual valuation reports for each of the defendants. Some unhappiness occurred over the compensation issue which led to complaints being made by the defendants to the Board of Valuers ("the board") against the plaintiff. B C

[3] The plaintiff, after having obtained information from the board on the numerous complaints lodged by the defendants, is now suing the defendants in a defamation action. The plaintiff is doing so under the name and style "Ernest Cheong PTL Chartered Surveyors VE (3)0017" as a practising valuer. D

The Defence Of Qualified Privilege

[4] The main contention of the defendants in the striking out application under O. 18 r. 19 of the RHC is that the complaints made by the defendants were made on an occasion of qualified privilege. There was no direct response on this issue by the plaintiff. Instead the plaintiff put up the argument that the defendants had no right of complaint against the plaintiff as valuer as the defendants appointed CIMBL PTL and not the plaintiff directly and that the plaintiff should be distinguished from CIMBL PTL. E F

[5] I do not find merit in this argument. The plaintiff's status as a registered valuer is subject to the respective laws regulating the registration. The plaintiff was appointed by a company of which he himself is a director. One cannot expect his own company, CIMBL PTL, to lodge a complaint against its own director. Some of the defendants are made up of squatters and are not well-educated. They were complaining against the plaintiff, amongst other things, for charging fees of 30% of their compensation award which they felt was excessive. If such complaint cannot be raised by those who are directly affected by the act of the plaintiff as a registered valuer, who else can lodge such a complaint? They are the very people who are directly affected by the act of the plaintiff, a registered valuer who has clothed himself in the guise of a company to protect himself from the laws that govern his professional conduct. G H I

[6] Counsel for the defendants submitted that the defendants' right to complain against the plaintiff as a registered valuer is a right provided under the law. The Valuers, Appraisers and Estate Agent Rules 1986 (P.U (A) 64 /1986) ("the Rules") is a subsidiary legislation made under s. 32 of the Act. Under r. 133A of the Rules, a complaint must be made in writing. The said r. 133A provides that:

> (1) A complaint concerning the conduct of a registered valuer, appraiser or estate agent or a registered probation nary valuer or probationary estate agent shall be in writing ...

[7] The defendants' complaints against the plaintiff were properly lodged with the board in accordance with the required procedure under this rule. The Board of Valuers, Appraisers and Estate Agents is created by the Act. Amongst its main duties as laid out in s. 10 of the Act, the board is:

> (f) to hear and determine dispute relating to professional conduct or ethics of valuers;
>
> (g) to determine and regulate the professional conduct and ethics of valuers, appraisers and estate agents and to set standard of professional practice.

[8] Upon receiving complaints, the board under r. 134 of the Rules is to bring the complaints to a Complaints Investigation Committee that would be empanelled accordingly. Rule 134A sets out the procedures to be followed by the Complaints Investigation Committee.

[9] Clearly the defendants were exercising their rights given by the law to complain against a registered valuer. The complaints were done in accordance with a written law that provides for a proper avenue of complaint. An express duty of the board as set out in the Act is to maintain discipline and good governance amongst registered valuers who hold themselves out as professionals in the practice of valuation.

[10] I find the case of *Karthak v. Damai* [1962] MLJ 423, an authority cited by counsel for the defence, useful. In that case, the late Tun Mohamed Suffian Mohd. Hashim had occasion to decide on the issue of qualified privilege in the High Court at Alor Star. The facts in that case were these: a pupil in an army school alleged that the plaintiff had sexual relations with her and that she

had consequently became pregnant. She lodged a complaint with the school authorities. During the ensuing investigations the same allegations were repeated by her before the Enquiry Committee. A defamation suit was filed against her by the plaintiff. In deciding that the defence of qualified privilege was applicable, Tun Mohamed Suffian Mohd. Hashim quoted the principle of law enunciated in the English case of *Adam v. Ward* [1917] 2 AC 15 where Lord Dunedin stated that:

> ... A privileged communication is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social or moral to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[11] The Federal Court case of *John Lee & Anor v. Henry Wong Jan Fook* [1981] 1 MLJ 108 is a clear authority on this point. In that case, the Federal Court held that the defence of qualified privilege applied in a case where the recipient of the alleged defamatory statement was a trade union known as SCEU. SCEU had a written agreement with commercial employers in Sarawak on behalf of their employees. The employers of the respondents were under a duty to make the charge to the recipient SCEU as a party who had a right or interest to receive it. The Federal Court also cited *Adam v. Ward* and applied the same principle on this issue. The defence of qualified privilege was held applicable.

[12] The well enunciated principles governing qualified privilege require firstly, that a person who makes the complaint must have a duty whether legal, social or moral and, secondly, that the receiver of the complaint must have a corresponding interest in receiving it.

[13] There have been many complaints about declining standards of professionalism in the country. The respective bodies of each profession are tasked with the responsibility of maintaining good corporate governance and professional standards amongst their members. The Board of Valuers, being one such body, is entrusted with the responsibility of maintaining standards of professionalism amongst valuers. Towards this end, a complaint mechanism has been established in the rules. The rules provide for procedures to be used and the defendants have followed the steps stipulated in the rules. Anyone with complaints against a registered

valuer is duty bound to lodge such complaint for the board to assess the conduct of the valuer and to decide on his continued registration which is another of the board's duties under the Act. Such registration gives the public the confidence to deal with persons in that profession. As such, complaints against professional conduct can be an important source of information for the board of valuers when assessing and determining whether or not a particular valuer deserves to be allowed to continue practice as a registered valuer. That is the whole purpose of this complaint mechanism. For this mechanism to work, defendants or anyone affected must be allowed to lodge any complaint in the manner provided by the law. If not legal, the defendants certainly had a moral and social duty to lodge the complaints that they did. The defendants should be commended for exercising their rights under the law to benefit the public at large.

[14] It is through the exercise of this duty that the quality and standard of professionalism can be maintained amongst professionals in the country. Much has been said about standards and about corporate governance amongst professionals. Litigation of the nature as in this case goes against the very grain of instilling good ethics amongst professionals in particular and should be discouraged. In fact, the complaint mechanism relied on by the defendants in this case serves to instill better quality control and professional standards. At the same time, the procedures laid out serve to provide the necessary element of its confidentiality. The Board has also been given by the law the method of resolving the complaints and to take the appropriate steps to achieve the intended objective of maintaining a good code of ethics amongst registered valuers. This is one of the many ways of achieving world class human resources, aspired to by the nation.

[15] On the point of reciprocity required on the part of the receiver of the complaints, the board is not only a body with a corresponding interest as in the case of *John Lee & Anor v. Henry Wong Jan Fook* but it is also under a legal obligation as mandated by the law. The defendants having shown that they have legal rights to complain, and the board, quite clearly having a legal duty to receive the complaints, I am in full agreement with the submission by counsel for the defence, that the defence of qualified privilege is available to the defendants.

Defamatory Statements Not Pleaded

[16] The second issue brought up by counsel for the defence is that the statement of claim did not particularise the facts and matters relied upon by the plaintiff as required by O. 78 r. 3 RHC. This is because the plaintiff's cause of action is based on the reply letter from the board exhibited in EC2 of the plaintiff's affidavit in encl. 47. Exhibit EC2 is merely a letter from the board informing the plaintiff of the complaint received and requiring the plaintiff to appear before the Enquiry Committee. Therein, the complaints were itemized to be answered by the plaintiff before the Enquiry Committee. The names of the defendants were listed as the complainants. This letter is being used by the plaintiff as the basis for his defamation action against the defendants.

[17] Counsel for the plaintiff in response argued that, whilst it is true that the statement of claim does not particularise the facts as required by O. 78 r. 3 RHC, the facts are within the full knowledge of the defendants.

[18] Obviously, the plaintiff does not have the original alleged defamatory statement made by the defendants. The letter from the board in EC2 cannot form the basis of the action by the plaintiff unless the board itself is now being sued by the plaintiff. Thus the claim is based on hearsay and therefore speculative in nature.

[19] In the case of *Worker's Party v. Tay Boon Too & Anor* [1975] 2 MLJ 124, the speech which was alleged to be defamatory was a translation from Hokkien to English and was published as a news broadcast in English. Reliance on such a translated report was found by the Appeal Court to be fatal to the appellant's claim. The plaintiff in the present case has actually no clue as to what was actually written to the board about him. He is merely guessing that something defamatory had been written about him on the basis of the letter from the board. Relying on John Lee, the letter issued by the board cannot form the basis of the plaintiff's claim against the defendants. A claim for defamation must be based on an original publication or statement and the alleged defamatory statement must be particularized in accordance with O. 78 r. 3 RHC. Both these requirements are absent in this case.

A

Absence Of Malice

[20] As the defendants have complied with the procedure for making complaints, no malice can be inferred. There is no evidence that the complaints were communicated to any person outside the
B complaint process.

[21] Allowing a defamation suit of this nature to continue, defeats the whole purpose of the complaint process set up by law and must not be encouraged. If claims of this nature are allowed, the floodgates will be opened to defamation suits whenever disciplinary
C bodies receive complaints from the public against their members. The public should be free to lodge complaints as a means of recourse against what they perceive to be wrong or unprofessional conduct so long as they do so within the confines of the law. They should be allowed to do so without having to fear the
D possibility of legal action.

[22] I find this to be a plain and obvious case for the plaintiff's claim to be struck off and for all the above reasons I allow the defendants' appeal to strike out the plaintiff's claim in encl. 57
E with costs.

F

G

H

I